85-1885

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether there can be reasonable expectation of privacy, for the purposes of the Fourth and Fourteenth Amendments, with respect to garbage placed in a communal trash bin of a multi-unit apartment building.

2. Whether there is an abandonment of property, for purposes of the Fourth and Fourteenth Amendments, when garbage is placed in a communal trash bin of a multi-unit apartment building.

3. Whether the Fourth and Fourteenth Amendments are violated when a police officer searches a communal trash bin of a multi-unit apartment building without a search warrant, probable cause, or consent.

TABLE OF CONTENTS

	PAGES
PETITION FOR WRIT OF CERTIORARI	1-27
OPINIONS BELOW	3
JURISDICTION	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	6 - 9
STATEMENT OF FACTS	9-13
HOW THE FEDERAL QUESTION IS PRESENTED	13-17
REASONS WHY THE WRIT SHOULD BE GRANTED	17-26
CONCLUSION	26-27

CASES	PAGES
Abel v. United States 362 U.S. 217 (1960)	23
American Railway Express Co. v. Levee, 263 U.S. 19 (1923)	4
California v. Krivda 405 U.S. 1039 (1972)	18
Croker v. State 477 P.2d 122 (Wyo. 1970)	22
Hester v. United States 265 U.S. 57 (1924)	23
In re Lance W. 37 Cal.3d 873 (1985)	16
Katz v. United States 389 U.S. 347 (1967)	23
Magda v. Benson 563 F.2d 111 (CA6 1976)	21
Michigan v. Long 463 U.S. 1032 (1983)	20
New York v. Quarles __U.S.__ 104 (1984)	16
People v. Edwards 71 Cal.2d 1096 (1969)	18
People v. Huddleston 38 Ill.App.3d 277 (Ill.App. 1976)	22
People v. Klausing 41 Ill.App.3d 588 (Ill.App. 1976)	22

CASES	PAGES
People v. Krivda 5 Cal.3d 357 (1971)	17,22,23
People v. Krivda 8 Cal.3d 623 (1973)	19
People v. Rooney 175 Cal.App.3d 634 (1985)	3
People v. Shuey 13 Cal.3d 855 (1975)	13
People v. Smith 34 Cal.3d 251 (1983)	16,17
People v. Superior Court (Barrett) 23 Cal.App.3d 1004 (1972)	24
Smith v. Maryland 422 U.S. 735 (1979)	23
State v. Fassler 108 Ariz. 585 (Ariz. 1972)	22
State v. Oquist 327 N.W.2d 587 (Minn. 1982)	22
State v. Smith 510 P.2d 793 (Alaska 1973)	22
State v. Schultz 385 So.2d 1326 (Fla.App. 1980)	22
United States v. Alden 576 F.2d 772 (CA8 1978)	21
United States v. Biondich 652 F.2d 743 (CA8 1981)	21

CASES	PAGES
United States v. Crowell 586 F.2d 1020 (CA4 1978)	21
United States v. Dziala 441 F.2d 212 (CA2 1971)	21
United States v. Jacobsen __U.S.__ (1984)	25,26
United States v. Kramer 711 F.2d 789 (CA7 1983)	21
United States v. Michaels 726 F.2d 1307 (CA8 1984)	21
United States v. Muller 425 U.S. 435 (1976)	23
United States v. Minker 312 F.2d 632 (CA3 1962)	21
United States v. Mustone 469 F.2d 970 (CA1 1972)	21
United States v. Reicherter 647 F.2d 397 (CA3 1981)	21
United States v. Shelby 573 F.2d 971 (CA7 1978)	21
United States v. Sumpter 669 F.2d 1215 (CA8 1982)	21
United States v. Terry 702 F.2d 299 (CA2 1983)	21
United States v. Vahalik 606 F.2d 99 (CA5 1979)	21

STATUTES	PAGES
California Penal Code	
§ 337a, subdivision 1	6
§ 337a, subdivision 2	6
§ 337a, subdivision 4	6
§ 337a, subdivision 5	6
§ 337a, subdivision 6	6
§1538.5	6,7
RULES	
Rules of United State	
Rule 17.1(b)	22
CONSTITUTION	
United States Constitution	
Amendment IV	5,8,19-20,25,27
Amendment XIV § 1	5
Title 28, § 1257(d)	4
California Constitution	
Art. I, § 28, subidivision	16

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THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

PETER ROONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate

District, Division Seven, reversing the order of the trial court dismissing the criminal action against respondent and holding that there was probable cause for the issuance of a search warrant even if incriminating items found in a trash bin are excluded, but holding that such items found in the trash bin were obtained in violation of the Fourth Amendment. The judgment and order of the Court of Appeal was filed on December 13, 1985. An order modifying the opinion was filed by the Court of Appeal on December 19, 1985. Petitions for rehearing were denied by the Court of Appeal on January 7, 1986. Petitions for review by the California Supreme Court, filed respectively by petitioner and respondent, were denied on March 13, 1986. An Application by peitioner for a stay of

petitioner for a stay of issuance of the remittitur was granted by the Court of Appeal on March 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeal, with the order of modification of opinion, appears as Appendix A of this petition. It is published as People v. Rooney, 175 Cal.App.3d 634 (1985). A copy of the Court of Appeal's order denying petitions for rehearing is attached hereto as Appendix B. The order of the California Supreme Court denying petitions for review is attached hereto as Appendix C. The order of the Court of Appeal granting the application of stay of issuance of remittitur is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven was filed on December 13, 1985, and the opinion was modified on December 19, 1985. Timely petitions for rehearing were denied by the Court of Appeal on January 7, 1986. Timely petitions for review were denied by the California Supreme Court on March 13, 1986. Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so the time for petitioning for a writ of certiorari runs from the date of the refusal to review. (American Railway Express Co. v. Levee 263 U.S. 19, 20-21 (1923).) This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE[1/]

Respondent was charged in a felony complaint with having committed, on or about January 22, 1984: bookmaking (California Penal Code section 337a, subdivision 1) in count I; keeping a place with paraphernalia (id., subdivision 2) in count II; recording wagers (id., subdivision 4) in count III; permitting a place to be used for bookmaking purposes (id., subdivision 5) in count IV; and accepting wagers (id., subdivision 6) in count V. (CT: 33-37.) Respondent moved that the magistrate quash a search warrant pursuant to Penal Code section 1538.5 and a hearing was held on said motion to quash and dismissed the felony on April 12, 1984. The magistrate granted the motion to quash and dismissed the felony complaint after it was represented that the

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1. The designation "CT" refers to the Clerk's Transcript. The designation "RT" refers to the Reporter's Transcript.

People would be unable to proceed. (CT: 21/11-22.)

The prosecution moved in the Superior Court that the felony complaint be reinstated pursuant to Penal Code section 871.5. (CT: 38-41.) On May 16, 1984, the Superior Court granted the People's motion to reinstate the felony complaint. Respondent then waived his right to a preliminary hearing. The parties stipulated that respondent be bound over to the Superior Court and that the information be deemed filed on that date with the same charges as in the felony complaint. Respondent then was arraigned and pleaded not guilty, and the cause was continued. (CT: 90.)

On May 24, 1984, respondent moved to suppress evidence pursuant to Penal Code section 1538.5. (CT: 91-94.)

On June 6, 1984, a hearing was held in the Superior Court on said motion. After argument, that court granted the motion to dismiss. After a representation that the People would be unable to proceed, the Superior Court dismissed the criminal action. (CT: 95; RT: 10/15-11/5.) The People appealed from that order.

The Court of Appeal reversed the order dismissing the criminal action against respondent. It ruled that a search warrant used to obtain evidence was supported by probable cause, but held that the incriminating items found in the trash bin belonging to the multi-unit apartment building in which respondent lived to have been seized in violation of the Fourth Amendment, prior to the issuance of the search warrant. By virtue of the Court of

Appeal's ruling, these incriminating items will therefore be inadmissible at the forthcoming trial of respondent.

STATEMENT OF FACTS

The instant case pertains to the sufficiency of the affidavit in support of a search warrant and to the admissibility of evidence seized prior to the issuance of that warrant. The warrant (CT: 23-25) authorized the search and seizure of evidence pertaining to bookmaking at apartment #8, 1120 North Flores Street, West Hollywood. The supporting affidavit (CT: 26-32) contained an opinion of the affiant and his partner officer that a straight-in-back office bookmaking operation was conducted at the premises in question. (CT: 32/9-25.)

We summarize the affidavit, in its salient aspects, as follows: A confidential informant informed the affiant, on December 3, 1983, "that Pete Rooney at telephone number 213-656-8430 was accepting wagers on professional football events . . . ." The affiant confirmed "through Departmental sources" that the telephone number was listed to 1120 North Flores Street, apartment #8, West Hollywood, with Peter Ryan as subscriber. A record check disclosed that Peter Rooney had one prior bookmaking arrest, on September 11, 1978, at the same address. The affiant obtained a booking photograph of Peter Rooney. (CT: 29/4-19.)

On December 15, 1983, affiant and his partner officer went to 1120 North Flores Street. They walked down the driveway to the apartment trash bin, approximately

8 feet long by 4 feet wide by 5 feet high, located in the subterranean garage of the apartment building.[2/] There was trash spilling out of the bin onto the ground. The officers searched the bin and noticed that trash from numerous different apartments was co-mingled inside it. When they reached the bottom half of the bin, the affiant noticed a paper shopping bag with mail addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Within this bag

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2. The Court of Appeal's opinion refers to the apartment building as having twenty eight units. (Appendix A, p. 3.) However, neither the warrant nor affidavit specified the number of apartments in the building. It is described as simply being a "two story multi-unit building." (CT: 23, 26.) The origin of the Court of Appeal's statement appears to have been a representation made by a deputy district attorney to the magistrate, which was not challenged by defense counsel. (CT: 7/7-9.)

of trash, the affiant discovered, inter alia, pieces of paper with sports wagers, pays and owes, and a tally sheet of wagers on different professional football teams. There was mail addressed to Pete Rooney, but not to Peter Ryan in this bag. (CT: 29/20 - 30/10.)

On December 16, 1983, the affiant observed a male caucasian, whom he recognized from the booking photograph to be Peter Rooney, drive into the subterranean garage at the apartment building in question and then enter apartment #8. (CT: 30/15-21.)

Between December 30, 1983 and January 6, 1984, the affiant dialed telephone number 213-656-8430 and overheard a telephone conversation between "a citizen informant and an unknown male." The informant asked the unknown male, "What's the latest line?" The unknown male returned with the latest line on the professional

football games to be played. (CT: 31/8-14.) Both affiant and his partner officer had bookmaking expertise. (CT: 31/24-32/8.)

HOW THE FEDERAL QUESTION IS PRESENTED

Respondent's motion to suppress evidence asserted as one ground for the motion "that the trash can search was in violation of Edwards [71 Cal.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969)] and Krivda, 5 Cal.3d 357 [486 P.2d 689, 96 Cal. Rptr. 62] (1971)." (CT: 94.) At the hearing on the motion to suppress, respondent clearly claimed that respondent's reasonable expectation of privacy was violated by the search of the communal trash bin. (RT: 6/2-12.) The trial court expressly grounded the granting of the motion to suppress upon the issue pertaining to the search of the trash bin. (Id.: 10/15-25.)

The Court of Appeal, in its opinion reversing the dismissal order, ruled that: (1) the warrantless search of respondent's apartment building's trash bin constituted an unreasonable search and seizure because of the lack of probable cause; and (2) that the search warrant affidavit provided probable cause for the issuance of the search warrant even excluding the items seized from the trash bin. By virtue of this ruling, incriminating items recovered from the bin will be inadmissible evidence at respondent's forthcoming trial.

At first blush, it might be urged that a petition for writ of certiorari should not be granted because the Court of Appeal's conclusion that the search of the apartment building communal trash bin was unreasonable constitutes obiter dicta. However, the Court of Appeal's determination

that the search of the trash bin was unreasonable cannot be deemed to merely constitute obiter dicta. Unless overturned on this point, the Court of Appeal's conclusion constitutes the law of the case. (See People v. Shuey 13 Cal.3d 855, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975). Hence at the trial, the People would be precluded from introducing evidence as to what the police officers had found in the trash bin, i.e., a brown paper shopping bag with mail addressed to defendant and pieces of papers constituting evidence of bookmaking operations.

Accordingly, the suppression of the evidence pertaining to the search of the trash bin is a "final judgment" so as to confer jurisdiction over the case on the Court because the People's suppression claim would be moot if the accused were convicted and if the accused were acquitted, the People would

be precluded from pressing its federal claim again on appeal. (New York v. Quarles __U.S.__, 104 S.Ct. 2626, 81 L.Ed.2d 550, 554 n. 1. (1984).)

The Court of Appeal held that the search of the communal trash bin violated the search-seizure provisions of both the Federal and California Constitutions. However, the prosecution in the instant case began after June 9, 1982. Article I, section 28, subdivision (d) of the State Constitution abrogates "a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal Constitution" (In re Lance W. 37 Cal.3d 873, 879, 694 P.2d 744, 210 Cal. Rptr. 631 (1985)) with respect to prosecutions committed after June 9, 1982, the effective date of the adoption of Proposition 8. (People v. Smith 34 Cal.3d 251, 258 667 P.2d 149, 193

Cal. Rptr. 692 (1983).) The Court of Appeal noticed the applicability of the abrogation of the exclusionary rule based solely upon State constitutional grounds. (Appendix A, pp. 12-18.) Hence the Fourth Amendment issue is squarely before this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

In People v. Krivda 5 Cal.3d 357, 468 P.2d 689; 95 Cal. Rptr. 62 (1971), the California Supreme Court held that marijuana remnants found by the police in a warrantless search of defendant's trash barrells, which had been placed on the parkway adjacent to the sidewalk and whose contents had not lost their identity by being combined with a conglomeration of other trash, were the product of an illegal search.

Although the Court of Appeal conceded in the instant case that "it appears logical to conclude that a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can such as [People v.] Edwards [71 Cal.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969)] and Krivda, we are not prepared to adopt an 'open fields' rule for communal trash bins, thereby eliminating the need for any particular showing of [probable] cause." (Appendix A, p. 9. Bracketed matter supplied.)

This Court granted certiorari with respect to Krivda in 1972 (405 U. S. 1039), but subsequently the judgment of the California Supreme Court was vacated and the cause remanded to that court for appropriate

proceedings as this Court was unable to determine whether the California court had based its holding upon the Fourth and Fourteenth Amendments to the United States Constitution, or upon the equivalent California constitutional provision, or both. (California v. Krivda 490 U.S. 33 (1972).) Subsequently, the California Supreme Court reissued its initial opinion pursuant to this Court's mandate for further proceedings (Krivda, 490 U.S. 33), and certified that it relied upon both the Fourth Amendment and the State Constitution. Accordingly, the latter's search-seizure provision furnished an independent ground. to support its holding. (People v. Krivda 8 Cal.3d 623 504 P.2d 457, 105 Cal. Rptr. 521 (1973).) Under what is now existing practice, it is likely that this Court would have decided Krivda on its merits. (See

Michigan v. Long 463 U.S. 1032, 1040-1041 (1983)), where this Court indicated that it might review a state court decision which "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." In any event, it is clear that the ruling below is based solely upon an interpretation of the Fourth Amendment. We respectfully urge that if this issue was worthy of review by this Court in 1972, it is still worthy of review in 1986.

The opinion of the Court of Appeal noted that "various federal courts have held that trash placed in an area where it can be collected is abandoned property that is

not protected by the Fourth Amendment."[3/]

(Appendix A, p. 13, Citations omitted.)

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3. These cases (including those cited by the Court of Appeal) are: United States v. Michaels, 726 F.2d 1307, 1312-1313 (CA8 1984); United States v. Kramer, 711 F.2d 789, 792 (CA7 1983); United States v. Terry 702 F.2d 299 (CA2 1983); United States v. Sumpter, 669 F.2d 1215, 1221 (CA8 1982); United States v. Reicherter, 647 F.2d 397, 399 (CA3 1981); United States v. Biondich 652 F.2d 743, 745 (CA8 1981); United States v. Vahalik, 606 F.2d 99, 100-101 (CA5 1979); United States v. Crowell, 586 F.2d 1020, 1024-1025 (CA4 1978); United States v. Shelby, 573 F.2d 971, 973 (CA7 1978); United States v. Alden, 576 F.2d 772, 777 (CA8 1978); Magda v. Benson, 536 F.2d 111, 112, 113 (CA6 1976); United States v. Mustone, 469 F.2d 970, 973 (CA1 1972); United States v. Dzialak, 441 F.2d 212, 215 (CA2 1971); United States v. Minker, 312 F.2d 632, 634-635 (CA3 1962).

There are state cases to the same effect.[4/] A significant factor indicating whether this Court will grant certiorari is "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." (Rule 17.1(b), Rules of the United States Supreme Court.)

Insofar as the Krivda rule is considered as a rule of evidence, the Fourth

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4. These include: State v. Oquist, 327 N.W.2d 587, 590-591 (Minn. 1982); State v. Smith, 510 P.2d 793, 796 (Alaska 1973); State v. Fassler, 108 Ariz. 585, 503 P.2d 807, 813-814 (Arizona 1972); Croker v. State, 477 P.2d 122, 123 (Wyo. 1970); State v. Schultz, 388 So.2d 1326, 1329 (Fla.App. 1980); People v. Klausing, 41 Ill.App.3d 588, 353 N.E.2d 441, 444 (Ill.App. 1976); People v. Huddleston, 38 Ill.App.3d 277, 347 N.E.2d 76, 80 (Ill.App. 1976).

Amendment now constitutes its sole justification. We urge that Krivda was erroneously decided since it does not follow the precedent of this Court in the area of abandonment. (See Abel v. United States 362 U.S. 217 (1960); Hester v. United States, 265 U.S. 57 (1924).) Secondly, the Krivda doctrine has been irreparably eroded by this Court's opinions applying Katz v. United States, 389 U.S. 347 (1967) to analogous situations. (See, e.g., Smith v. Maryland, 442 U.S. 735, 743-744 (1979); United States v. Miller, 425 U.S. 435, 442-443 (1976).)

Another reason for concluding that there was no reasonable expectation of privacy is that a communal trash bin of an apartment building is especially likely to be subject to trespassory and other incursions. It is not simply the presence of a likelihood that there might be many trespassory incursions into exterior trash

receptacles that is controlling. In addition to respondent and other occupants of his apartment and to trash collectors, the occupants of twenty-seven other apartments in the same apartment building also had legitimate access to the communal trash bin. And the owners and managers of the apartment building, or their agents, had similar legitimate access. Under the circumstances of this case, defendant had even less reasonable expectation of privacy with respect to the trash placed in the communal trash bin, to which occupants of twenty-seven other apartments had legitimate access, than a person who places his trash in a neighbor's garbage can. Yet, in the latter case, it has been held there is no reasonable expectation of privacy. (People v. Superior Court (Barrett) 23 Cal. App.3d 1004, 1010, 100 Cal. Rptr. 604 (1972).)

Finally, the critical issue is whether a search of a communal trash bin infringes an expectation of privacy that society is prepared to consider reasonable. (United States v. Jacobsen __ U.S. __, 80 L.Ed.2d 85, 103, 104 S.Ct. 1652, 1661 (1984).) As the United States Supreme Court has declared: "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." (Id., 104 S.Ct. at 1661.) Moreover, "it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by laws must have a source outside the Fourth

Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (Id., 104 S.Ct. at 1661 n.22.)

For the foregoing reasons, it is respectfully requested that certiorari be granted in order for this Court to rule that a search of an overflowing communal trash bin, and indeed any trash receptacle so placed as to indicate its readiness for collection, without probable cause or consent, does not violate the Fourth Amendment.

CONCLUSION

When garbage is placed in a trash bin, it continues to be garbage when it is taken out. The Court below transformed what respondent thought was

garbage when placed in the bin into constitutionally protected property when taken out by the police. A grant of certiorari would give this Court an opportunity to make it clear that the Fourth Amendment was adopted for more noble purposes than the protection of discarded garbage.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. PETER ROONEY, Defendant and Respondent.	No. B006936 (Super.Ct. No. A 088619)

APPEAL from a judgment of the Superior Court of Los Angeles County. D. Fitts, Judge. Reversed.

Ira Reiner, District Attorney of Los Angeles County, Donald J. Kaplan and Arnold T. Guminski, Deputy District Attorneys, for Plaintiff and Appellant.

(Court of Appeal, Second Dist., Filed December 13 1985, Clay Robbins, Jr., Clerk.)

Arthur Lewis, for Defendant and Respondent.

The People bring this appeal (Penal Code, § 1238, subd. (a)(7)[1] from the order dismissing the case against defendant who was charged with bookmaking (§ 337a). The dismissal was entered after the prosecution represented that it could not proceed due to the granting of defendant's motion to quash a search warrant and suppress evidence (§ 1538.5). The first issue before us is whether the warrantless search of the defendant's apartment building's trash bin constituted an unreasonable search and seizure. We conclude that it did for lack of probable cause. The second issue is

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1. Hereafter, all section references are to the Penal Code.

whether a police officer's affidavit provided probable cause for the issuance of the search warrant authorizing the search of defendant's apartment. We conclude that even excluding the items seized from the trash bin, the tip from the informant coupled with other corroborating evidence were sufficient to support the warrant. We therefore reverse and remand.

I

FACTUAL AND PROCEDURE BACKGROUND

The following evidence was before the magistrate. On December 3, 1983, an informant told the affiant, Officer Shorb, that defendant, Peter Rooney, was accepting wagers on professional football games over the telephone and with an answering machine at (213) 656-8430. Although the informant told Shorb that defendant was "in the loca-

tion between 1600 hours and 1800 hours," the informant did not tell Shorb the address of "the location."

On December 7, 1983, Shorb ascertained through the telephone company that the number given to him by the informant was registered to a Peter Ryan at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb also determined that the utilities at that address were registered in the name of Peter Ryan.

On December 13, 1983, Shorb learned from defendant's arrest record that defendant had been arrested three years earlier for bookmaking activities at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb obtained a booking photo of defendant from the prior arrest.

On December 15, 1983, Officers Shorb and Wyeth went to 1120 North Flores Street, West Hollywood, a 28-unit apartment building with a subterranean garage. The officers entered the garage and conducted a search of the communal trash bin, which measured approximately 8'x4'x5', and was filled to capacity. Upon reaching the bottom half of the bin, Shorb discovered a brown paper shopping bag with mail addressed to defendant, but not to Peter Ryan, at 1120 North Flores Street, Apartment #8, West Hollywood, the address obtained from the telephone company and defendant's arrest record. The bag also contained pieces of paper with "sports wagers, pays and owes, and a tally sheet of wagers on professional football teams. . . ."

While conducting a surveillance of the apartment building on December 26,

1983, Shorb saw a male caucasian, whom he recognized from the booking photograph to be defendant, drive into the subterranean garage and enter apartment #8. Shorb observed apartment #8 for approximately one hour, during which time no one entered or left. This occurred on the Friday afternoon before a weekend when numerous professional football games were to be played.

Subsequently, Shorb dialed the telephone number that was given to him by the informant and which the telephone company told him was listed to apartment #8, and overheard a telephone conversation between the informant and an unknown male. The informant asked, "'What's the latest line?,'" to which the unknown male responded with the latest point spreads on professional football games.

Both Officers Shorb and Wyeth had prior experience in bookmaking investigations and arrests, from which they formed the opinion that defendant was operating a bookmaking office at the apartment. Based on Shorb's supporting affidavit which detailed the above information, a search warrant issued authorizing a search of defendant's apartment. The record on appeal contains no details of the search, the items seized, or defendant's arrest.

Defendant moved to quash the search warrant and to exclude evidence (§ 1538.5). In granting his motion, the magistrate stated that the betting markers and paraphernalia found in the warrantless search of the trash bin were the fruits of an invalid search. The magistrate concluded that the other evidence corroborating the informant's

tip -- the telephone conversation concerning the latest line and defendant's prior arrest for bookmaking at the same address that was matched to the telephone number provided by the informant -- failed to provide probable cause to support the issuance of the search warrant.

After the superior court granted the prosecution's section 871.5 motion, defendant again moved to quash the search warrant and to suppress evidence (§ 1538.5). At the hearing on defendant's motion, the trial court ordered the search warrant quashed and the evidence suppressed on the ground that the warrantless search of the trash bin constituted an unreasonable search and seizure.

Following the prosecutor's representation that the People would not be able to proceed, the case was dismissed. The prosecution appeals from the order of dismissal.

II

DISCUSSION

The prosecution contends that the warrantless search of the trash can was a valid search under both the federal and state Constitutions, and that the search warrant was properly supported by the existence of probable cause.

A. The Warrantless Search of the Trash Bin

The issue before us is the reasonableness of defendant's expectation of privacy in a bag of trash placed in a communal trash bin located in the apartment's garage, an area accessible to the public. First, we note that the mere

fact that the trash bin was located in an area accessible to the public is not dispositive of the issue. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (Katz v. United States (1967) 389 U.S. 347, 351-352.)

With respect to the validity of trash can searches, our Supreme Court has stated that the "secondary degree of protection [that] applies to automobiles . . . also appears to apply to a trash can placed by the curb for the disposal of its contents . . . ." (People v. Dumas (1973) 9 Cal.3d 871, 882, fn. 9.) An Automobile

"may be searched upon probable cause and upon a showing that 'delay would enhance the possibility the articles would be destroyed or placed beyond the reach of the officers. [Fn. omitted.]'" (People v. Parker (1974) 44 Cal.App.3d 222, 229.) In Dumas, the court noted that it would be anomalous to hold that a trash can next to a house may not be searched "but that an automobile parked immediately adjacent to it is subject to such a search, inasmuch as an automobile undeniably evokes at least as great an an expectation of owner privacy as a trash can." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

Under California law, trash placed in a trash can in one's back yard or in front of one's house where it can be collected is not abandoned property outside the scope of protection of the

Constitution. In People v. Edwards (1969) 71 Cal.2d 1096, our Supreme Court held that trash placed in a trash can located in the defendant's back yard was not abandoned, and thus not placed beyond the protection of the Fourth Amendment and article I, section 19, of the California Constitution. (Id., at pp. 1104-1105.) As stated in Edwards: "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse

and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere." (Id., at p. 1104.)

And in People v. Krivda (1971) 5 Cal.3d 357, our Supreme Court held that a trash can placed in front of the defendant's house for collection of its contents was not abandoned property placed beyond the protection of the Fourth Amendment and the state Constitution.[2/] While it may be reasonable to anticipate that nonpolice third persons may rummage through and scavenge from one's trash barrels despite local ordinances prohibiting such behavior the probability

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2. The United States Supreme Court vacated and remanded Krivda, to inquire as to whether the decision was based on federal or state constitutional grounds. (California v. Krivda (1972) 409 U.S. 33.) The court's opinion on remand (People v. Krivda (1973) 8 Cal.3d 623) adopted both federal and state constitutional grounds.

of that occurrence does not not necessarily create the same expectation that police would rummage through and retrieve evidence from one's trash barrels without a search warrant. (People v. Krivda, supra, 5 Cal. 3d at pp. 366-367.) The court expressed a concern against "encourag[ing] a practice whereby our citizens' trash can could be made the subject of police inspection without the protection of applying for and securing a search warrant." (People v. Krivda, supra, 5 Cal.3d at p. 367.)

While it appears logical to conclude that a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can such as in Edwards and Krivda, we are not prepared to adopt an "open fields" rule for communal trash bins, thereby eliminating the need for any particular showing of cause. (See Hester v. United States (1924) 265 U.S. 57, 58-59; People

v. Dumas, supra, 9 Cal.3d at p. 882.) Our position is supported by other appellate decisions concerning communal trash bin searches that have not distinguished Krivda solely on the difference between privately owned trash cans and communal trash bins. (People v. Parker, supra, 44 Cal.App.3d 222; People v. Stewart (1973) 34 Cal.App.3d 695.)

The court in Stewart recognized the logic of concluding that an apartment house tenant who uses communal trash bins has less reason to believe what he deposits will remain

private than does a resident of a single fami dwelling using a privately owned trash can. (Id., at p. 700.)[3] But Stewart recognized th "what further distinguishes [Stewart] from Krivda, however, is the fact that police here had probable cause to believe the trash cans contained evidence of a crime." (Ibid.) Krivda "did not preclude the possibility that a warrantless search of the trash can would have been valid had probable cause existed to support it." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

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3. We note, however, that the California Supreme Court depublished People v. Smith (1975) 52 Cal.App.3d 514, which stated that "[u]sers of the communal receptacle . . . . have no more reason than the householder [in a single family dwelling] to expect their trash to be examined by police officers." (Id., at p. 522.)

Similarly, the court in Parker upheld the warrantless search of a communal trash bin due to the existence of probable cause. (People v. Parker, supra, 44 Cal.App.3d at p. 229.) The court stated: "We do not believe, however, that [Krivda] thereby intended to draw any hard and fast distinction between trash which is at curbside and that which is still on the exterior premises of an apartment house. Rather, the distinction which the court drew was between 'fishing expeditions' where the officer lacked probable cause to believe the trash can contained contraband and those situations where such probable cause existed, as was the case herein. Again, analogy with the automobile cases is helpful. Searches of vehicles have been upheld not only where the vehicle was in transit on the highway, but where it was parked at a curb, adjacent to or far from the defendant's home, and even when it was parked in a common garage

area of the defendant's apartment. [Citation.] Parallel reasoning requires a similar result to apply to trash in a common receptacle adjacent to a large apartment." (People v. Parker, supra, 44 Cal.App.3d at p. 231.)

We agree with Stewart and Parker that the rationale cited for relaxing the warrant requirement for automobile searches applies to communal trash bin searches. As stated by the court in Parker: "Materials placed in trash cans, being placed there for removal and disposal, are highly portable. While trash is typically removed on a specific ascertainable day and within certain circumscribed hours, it is just as typically not subject to the security precautions people normally take with respect to property they intend to keep. Trash placed in a common receptacle used by multiple apartment dwellers is

especially likely to be tampered with. Trespassory incursions into exterior trash receptacles by human and animal foragers, although unwelcome are not totally unexpected. People normally do not take particular pains to assure that the contents of their trash bins will not be damaged by the weather and the likelihood of weather damage is increased when many people regularly use the receptacle." (People v. Parker, supra, 44 Cal.App.3d at p. 230.) Because the characteristics of trash receptacles are those "which diminish the reasonable expectation of privacy as to their contents and make it impractical to obtain a warrant, minimal additional circumstances need be shown by

the People in any particular case to justify their dispensing with a warrant." (Ibid.)

We now consider the validity of these decisions in light of the California Supreme Court's conclusion that article I, section 28, subdivision (d), of the state Constitution, the "Truth in Evidence" provision of the Victim's Bill of Rights (Proposition 8), abrogates "a defendant's right to object to and suppress evidence seized in violation of the California but not the federal, Constitution." (In re Lance W. (1985) 37 Cal.3d 873, 879.) While various federal courts have held that trash placed in an area where it can be collected is abandoned property that it not protected by the Fourth Amendment, those decisions are not binding on this

court since the United States Supreme Court has never squarely ruled on the issue. (See United States v. Sumpter (8th Cir. 1982) 669 F.2d 1215, 1221; United States v. Vahalik (5th Cir. 1979) 606 F.2d 99, 100-101; United States v. Shelby (7th Cir. 1978) 573 F.2d 971, 973-974; United States v. Crowell (4th Cir. 1978) 586 F.2d 1020, 1024-1025; Magda v. Benson (6th Cir. 1976) 536 F. 2d 111, 112-113; United States v. Mustone (1st Cir. 1972) 469 F.2d 970, 972; United States v. Dzialak (2d Cir. 1971) 441 F.2d 212, 215; United States v. Minker (3d Cir. 1962) 312 F.2d 632, 634-635.)

Because Edwards and Krivda are based on both federal and state constitutional provisions, we find them to be valid and binding authority that

this court must follow until either the California or United States Supreme Court rules on the issue. Since the search of the trash bin was without a warrant, the burden was on the prosecution to show proper justification. (People v. Edwards, supra, 71 Cal.2d at p. 1099.)

The prosecution contends that the trash was abandoned and hence fell outside the protection of the Fourth Amendment when it was placed in the communal trash bin. (Abel v. United States (1960) 362 U.S. 217.) In Abel, officers arrested defendant in his hotel room and waited while defendant packed his bags and checked out of the hotel. Defendant left behind certain items in the waste basket in the hotel room. Abel held that it was not "unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with

crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property." (Id., at p. 241.)

We distinguish Abel on its facts. Abel simply held that a defendant, after checking out of a hotel, retained no privacy expectation in the trash he left behind in the hotel room trash can. In the case at bench, the items were not left behind in a vacated hotel room as in Abel, but were placed in a trash bin in the garage of an apartment building. Under the line of California cases which classsifies trash cans under the secondary level of protection applicable to automobiles in determining Fourth Amendment search and

and seizure issues (see People v. Dumas, supra, 9 Cal.3d at p. 882, fn. 9), the burden rested on the prosecution to show that the trash had been abandoned under the facts of the case, or to show that the officers had probable cause to believe that the trash bin contained contraband. (See People v. Superior Court (1972) 23 Cal.App.3d 1004, which held the defendant had abandoned her trash bag by placing it in her neighbor's garbage can, thereby forsaking any reasonable expectation of privacy as to its contents.)

Here, the prosecution made no factual showing that the trash in the bin hand been abandoned. The placement of one's trash in a communal bin in the subterranean garage of one's apartment building is not necessarily an abandonment of one's trash to the police or general

public. As our Supreme Court stated in Krivda: "[H]ad defendants simply cast their trash onto the sidewalk for anyone to pick over and cart away, we would have no difficulty finding that defendants had thereby forsaken any reasonable expectation of privacy with respect thereto. (Fn. omitted.]" (5 Cal.3d at pp. 365-366.) But the existence of many municipal "ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated" (ibid.), would appear to refute the view that the contents of one's trash bags in the trash bins become public property when placed in the bin for collection.

However, we disagree with defendant's argument that he had a heightened expectation of privacy in the trash bin because it was located within the "curtilage" of his apartment. People v. Terry

(1964) 61 Cal.2d 137, 152-153, provides contrary authority. In Terry, police officers observed what appeared to be a marijuana cigarette on the dashboard of the defendant's car. Like the trash bin herein, the automobile in Terry was located in the subterranean garage of the defendant's apartment building. In upholding the warrantless search of the car due to the existence of probable cause, Terry stated, "Apparently the apartment garage was a common area; the officers did not commit a trespass by entering it." (Id., at p. 152.) In People v. Dumas, supra, 9 Cal.3d 871, our Supreme Court noted that the police in Krivda, unlike in Terry, lacked probable cause to justify the warrantless search. "Krivda . . . did not preclude the possibility that a warrantless search of the trash can would have been valid had

probable cause existed to support it. In this light, no conflict with Terry appears, and it is clear that an automobile does not become immune from the Carrol [v. United States (1925) 267 U.S. 132] rule permitting warrantless search simply because it is parked on or near a defendant's premises. [Citation.]" (Id., at p. 884.)

In the instant case, the trash at issue was not in plain view, but was located halfway down in the trash bin, in a paper bag. The contents of the bag were not visible without emptying or searching through the bin and the bag. The fact that the bag was "commingled" with a quantity of trash belonging to others, does not distinguish Edwards, because the bag's contents "had [not] lost its identity and meaning by becoming part of a large conglomeration of trash

elsewhere." (People v. Edwards, supra, 71 Cal.2d at p. 1104.)

At the time of their search of the trash bin, the officers had only the hearsay information provided by the informant coupled with the knowledge that the telephone number was registered to a Peter Ryan at the same address where defendant had been arrested for bookmaking three years before. Because there is nothing in the record to show that the informant was a citizen informant who was either a victim or a witness of a crime, other than the officer's conclusory use of the term "citizen informant," there must have been some corroboration of the informant's tip in order for there to have been probable cause. (See People v. Smith (1976) 17 Cal.3d 845, 852.) We find that the record is insufficient to establish the probability that evidence

of bookmaking would be found in the trash bin. Had the police waited to search the trash bin until after they observed the defendant entering the apartment and after they overheard the telephone conversation concerning the point spreads, we would reach a different result.

B. The Search Warrant is Supported by Probable Cause, Even Excluding the Items Seized from the Trash Bin

The standard by which a magistrate must determine the existence of probable cause for the issuance of a search warrant was explained in Illinois v. Gates (1983) 462 U.S. 213, 235, as follows: "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's

decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' [Citations.]"

With respect to the test for determining the credibility of anonymous informants and the accuracy of their information, Gates abandoned the two-pronged test established by Aguilar v. Texas (1964) 378 U.S. 108, and Spinelli v. United States (1969) 393 U.S. 410, and adopted a test based on the totality of the circumstances. Gates provides: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . .

including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 238-239.) The court repeated its often quoted statement: "A magistrate's 'determination or probable cause should be paid great deference by reviewing courts.' [Citation.]" (Id., at p. 236.)

We find that the search warrant authorizing the search of defendant's apartment was properly supported by probable cause. Viewing the evidence as a whole, we conclude that sufficient

evidence existed to determine a significant probability that evidence of bookmaking would be found in the apartment, even excluding the items seized from the trash bin.

A review of the facts in Gates is helpful to our determination that probable cause existed herein. In Gates, the police received an anonymous letter detailing the manner in which defendants moved drugs between Florida and Illinois, and predicted a trip on May 3. Police surveillance confirmed such a trip. The court upheld the search warrant, stressing the value of the corroboration of the details of the informant's tip: "The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he

would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. '[B]ecause an informant is right about some things, he is more probably right about other facts' [citation] -- including the claim regarding the Gateses' illegal activity. This may well not be the type of 'reliability' or 'veracity' necessary to satisfy some views of the 'varacity prong' of Spinelli [v. United States, supra, 393 U.S. 410], but we think it suffices for the practical, common-sense judgment called for in making a probable-cause determination. It is enough, for purposes of assessing probable cause, that '[c]orroboration through other sources of information reduced the chances of a reckless of prevaricating tale,' thus providing 'a substantial basis for crediting

the hearsay.' [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 244-245.)

In the case at bench, the informant's tip was corroborated in significant part through independent police investigation. First, defendant's police record showed that he had previously been arrested for bookmaking activities at apartment #8, the same apartment that was registered with the telephone company for the number provided by the informant. While defendant contends that People v. Chapman (1984) 36 Cal.3d 98, prohibits the police from using telephone company records to obtain the names and addresses of customers with unlisted telephone numbers, we find that there was a Fourth Amendment violation here. As a consequence of Lance W., the police did not need a warrant to obtain the address from the

telephone company. Chapman explicitly recognized that such a requirement does not exist under federal law, citing Smith v. Maryland (1979) 442 U.S. 735. (People v. Chapman, supra, 36 Cal.3d at 107, fn. 6; see People v. Lissauer (1985) 169 Cal.App.3d 413.) In addition, defendant cannot complain of the inevitable discovery of the address through his arrest record.

Second, the informant's tip that defendant was in "the location" where the telephone was located between certain hours was further corroborated when defendant was seen parking his car in the apartment building and entering apartment #8. Although the telephone and utilities for that apartment were listed in the name of Peter Ryan rather than in defendant's name, Shorb's affidavit states that this is consistent

with the conducting of bookmaking activities at that location.

Moreover, the informant's tip that defendant was taking bets over the telephone for professional football games was partially corroborated when Shorb, who dialed the number provided by the informant and registered to the apartment entered by defendant, overheard a conversation between the informant and an unknown male concerning the point spreads for professional football games.

We are not persuaded by defendant's argument that the fact he was seen entering the apartment during the predicted hours and that the officer overheard a the telephone conversation concerning point spreads do not constitute corroboration because there was nothing criminal about either event. However, the corroboration of an

anonymous informant's tip does not require a showing of criminal activity: "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." (Illinois v. Gates, supra, 462 U.S. at pp. 243-244, fn. 13.) We note that here, as in Gates, the corroborating evidence of "'seemingly innocent activity became suspicious in light of the initial tip.'" (Ibid.)

Our determination of the existence of probable cause for the issuance of the search warrant is not altered even if the incriminating items found in the trash bin are excluded. The other evidence presented by the prosecution are both substantial and independent

evidence that cannot be deemed tainted by any alleged illegality connected with the search of the trash bin.

Accordingly, we reverse the order of dismissal and remand for further proceedings consistent with the views expressed herein.

CERTIFIED FOR PUBLICATION

THOMPSON, J.

We concur:

LILLIE, P. J.

JOHNSON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PETER ROONEY, Defendant and Appellant.	No. B006936 (Super.Ct. No. A088619) ORDER MODIFYING OPINION

THE COURT:

It is ordered that the opinion in the above entitled matter filed December 13, 1985, be modified in the following respects:

Delete from page 23, lines 13, 14 and 15 the following:

(Court of Appeal, Second Dist., Filed December 19, 1985, Clay Robbins, Jr., Clerk.)

"We concur:

LILLIE, P. J.

JOHNSON, J."

and substitute therefore the following:

I concur:

JOHNSON, J.

I concur in the judgment only.

LILLIE, P. J.

CERTIFIED FOR PUBLICATION

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7

Office of the District Attorney B006936

Richard W. Gerry

849 South Broadway

11th Floor JAN 7 - 1986

Los Angeles, CA 90014

RE: People of the State of Calif.

vs.

Rooney, Peter

2 Criminal B006936

Los Angeles No. A088619

THE COURT:

Petitions for rehearing denied.

I would grant; Lillie, PJ.

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE

COURT OF APPEAL

2nd District, Division 7, No. B006936

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

I N B A N K

==========

PEOPLE

v.

PETER ROONEY

==========

Petitions for review DENIED.

Lucas, J. and Panelli, J., are of the opinion the petition should be granted.

BIRD

Chief Justice

(Supreme Court, Filed March 13, 1986, Laurence P. Gill, Clerk.)

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7

Office of the District Attorney B00693

Richard W. Gerry

849 South Broadway

11th Floor

Los Angeles, CA 90014

RE: People of the State of Calif.

vs.

Rooney, Peter MAR 20 1986

2 Criminal B006936

Los Angeles No. A088619

THE COURT: Application for stay of issuance of remittitur is granted.

CERTIFICATE OF SERVICE BY MAIL

Attorney:

IRA REINER
District Attorney of
Los Angeles County
ARNOLD T. GUMINSKI
Deputy District Attorney

849 South Broadway, 11th Floor
Los Angeles, California 90014

No: _____
October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed by the County of Los Angeles as a Deputy District Attorney, and I am a member of the Bar of the United States Supreme Court and representing the petitioner herein. My business address is 849 South Broadway, 11th Floor, Los Angeles, California 90014.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES as follows: By placing three copies in a separate envelope addressed to ARTHUR LEWIS, ESQ., Attorney at Law, 205 South Broadway, Suite 802, Los Angeles, California 90012 (Attorney for Respondent); and by placing one copy in a separate envelope addressed for and to each addressee named as follows:

HONORABLE DAVID N. FITTS
Judge of the Superior Court
West District - Santa Monica
1725 Main Street
Santa Monica, CA 90401

CLERK OF THE COURT OF APPEAL
Second Appellate District
3580 Wilshire Boulevard
Los Angeles, CA 90010

EDWARD T. FOGEL
Assistant Attorney General
State of California
3580 Wilshire Boulevard
Los Angeles, CA 90010

CLERK OF THE SUPREME COURT
State of California
350 McAllister Street
San Francisco, CA 94102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at Los Angeles, California, on the 6th day of May, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 6, 1986, at Los Angeles, California.

_____
ARNOLD T. GUMINSKI